

## PROPOSED LOSS DEFINITION - DECEMBER 2000 VERSION

(Comparison in “red-line/strike through” is to April 2, 1998 version)

In the Commentary to §§2B1.1 and 2F1.1 captioned "Application Notes" insert after Note 1 the following new Note 2:

2. *This Note applies to the determination of loss ~~for~~ purposes of subsection (b)(1).*

(A) *General Rule.—Subject to the exclusions in subdivision (B), ~~the~~ loss is the greater of ~~the~~ actual loss or ~~the~~ intended loss.*

[Causation] [Option 1 - adopt causation standard of “but for” plus reasonable foreseeability.

*"Actual loss" means the reasonably foreseeable pecuniary harm that resulted or will result from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).*

*"Reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew, or, under the circumstances of the particular case, reasonably should have known, ~~would~~ likely would result ~~follow~~, in the ordinary course of events, ~~as a result of~~ from that conduct. For example, in an offense involving unlawfully accessing, or exceeding authorized access to, a "protected computer," as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), "loss" ~~includes the reasonable cost to the victim of conducting a damage assessment, restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service~~<sup>1</sup> is the reasonably foreseeable pecuniary harm to the victim, which typically includes costs such as conducting a damage assessment and restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service.*

[Possible example of reasonable foreseeability:

*Suppose H pays D \$500 to inspect a home H has contracted to purchase. D does not actually conduct an inspection, but rather mails H a fraudulent inspection report stating that the property is free of all defects. Two days before closing, an underground oil tank – which must be removed before the sale may close – is discovered on the property. Due to the resulting unavoidable delay caused by the need to remove the tank, the closing must be postponed. Because H's lease on his present residence expired on the original closing date, H must locate temporary housing at additional cost. Further, H loses the financing he had*

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<sup>1</sup> Stricken language currently appears in §2F1.1, comment. (backg'd.)

*obtained and must procure new financing, at a higher interest rate, from another bank. On his way to the new bank to complete the paper work for the new loan, H is in an automobile accident resulting in damage to the vehicle and injuries to H. The \$500 paid for the inspection report is includeable in loss as a direct loss. The increased rental payment for temporary housing and the cost resulting from the higher interest rates are also included in loss because they follow in the ordinary course and, therefore, are foreseeable. However, although the damage incurred in the automobile accident would not have occurred but for the fraud, it nevertheless did not follow in the ordinary course of events and was not foreseeable by a reasonable person in the defendant's position. Accordingly, it is not included in loss.”]*

[Option 2 - combine current loss concepts from §§2B1.1 and 2F1.1; make clear “but for” causation is required but without concept of reasonable foreseeability.

*“Actual loss” means the pecuniary harm that resulted or will result from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).*

*“Pecuniary harm” includes the value of the property taken, damaged, or destroyed, and the value of money and services unlawfully taken.<sup>2</sup> Ordinarily, when property is taken or destroyed the loss is the fair market value of the particular property at issue. Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim.<sup>3</sup>]*

*“Intended loss” means the pecuniary harm that was intended to result from ~~be caused by~~ the conduct for which the defendant is accountable under §1B1.3, ~~even if that harm would have been unlikely or impossible to accomplish (e.g., as in a government sting operation.~~ “Intended loss” includes intended harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an intended insurance fraud in which the claim exceeded the insured value)[so long as the intended loss would reasonably have resulted if the facts were as the defendant believed them to be].*

#### **[Timing of measurement of loss]**

~~(B)(D)~~ Time of measurement: Loss should ordinarily be measured at the time

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<sup>2</sup> See §§2B1.1, comment. (n. 2) and 2F1.1, comment. (n. 9).

<sup>3</sup> See §2B1.1, comment. (n. 2).

[Option 1: *of sentencing, except as provided herein.*]

[Option 2: *the offense was detected.*]

(i) *For purposes of this guideline, an offense is detected when*

**[Time of detection]**

[Sub-Option 1: *discovered by a victim or a governmental agency*]

[Sub-Option 2: *the defendant knew or reasonably should have known that the offense was detected [or about to be detected] by a victim or a public law enforcement agency.*]

[Sub-Option 3: *the earlier of [Option 1] and [Option 2].*]

(C) *Exclusions from Loss.*—*Loss does not include the following:*

**[Interest]** [Option 1 - exclude all interest.

(i) *Interest of any kind, finance charges, late fees, penalties, anticipated profits, amounts based on an agreed-upon return or rate of return, or other opportunity costs.*]

[Option 2 - allow use of bargained-for interest; insert language in the loss definition prior to “exclusions” from loss.

*Interest shall be included in determining loss only if it is bargained for as part of a lending transaction that is involved in the offense. The court shall include any such interest that is accrued and unpaid as of the time the defendant knew or should have known that the offense had been detected.]*

(ii) *Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense, even if such costs are reasonably foreseeable.*

(D) (iii) *Credits In Determining Against Loss.*

~~(Except as provided in the subdivision (F)(i),~~ *Loss shall be reduced by [determined by excluding the value of the economic benefit the defendant or other persons acting jointly with the defendant transferred to the victim before the defendant knew or should have known that the offense*

~~had been~~ was detected.

- (a) For purposes of this ~~subdivision: (i)~~ section: (A) "economic benefit" [includes] [means] money, property, or services performed; and ~~(ii)~~ (B) "transferred" means pledged or otherwise provided as collateral, returned, repaid, or otherwise conveyed.

~~In the case of collateral, the value of the economic benefit is the amount the victim has recovered as of the time of sentencing from disposition of the collateral. If the collateral has not been disposed of by that time, the value is its fair market value as of the time of sentencing.~~

~~In any other case, the value of the economic benefit is its fair market value as of the time of transfer to the victim.~~

#### [Timing of valuation of benefit]

- (b) The value of any "economic benefit" transferred to the victim by the defendant for purposes of Subsection (C) shall ordinarily be measured at the time the offense was detected.
- (c) However, in a case involving collateral pledged by a defendant, the "economic benefit" of such collateral to the victim for purposes of Subsection (C) is the amount the victim has recovered at the time of sentencing from disposition of the collateral. If the collateral has not been disposed of by that time, the "economic benefit" of the collateral is its value at the time of sentencing.

#### [Exceptions to "benefit" ]

[Option 1 - no exceptions to excluding all benefits]

[Option 2 - do not allow exclusions from loss if "benefit" received by victim(s) was of "de minimis" value, was substantially different than what victim wanted. Actual language not shown.

- (d)~~(i)~~ However, loss shall not be reduced by the value of:

(1)~~(a)~~ [benefits of de minimis value transferred by the defendant to the victim(s)] [economic benefit transferred to the victim that has little or no value to the victim because it is substantially different from what the victim intended to receive] ~~defendant or persons acting jointly with the~~

~~defendant led the victim to expect, loss shall not be reduced by the value of that economic benefit.]; or~~

- (2)(b) ~~services fraudulently rendered to victims by persons falsely posing as licensed professionals, or goods falsely represented as approved by a governmental regulatory agency, or goods for which regulatory approval by a government agency was obtained by fraud.]~~

[Investment schemes] [Both options would move investment scheme rule from “Special Rules” provision to “exclusions.”]

[Option 1 -

- (e) ~~In applying subdivision (B) (C) in a case involving a fraudulent investment scheme, such as a Ponzi scheme, actual the loss is the sum of the net actual losses of each victim who lost all or part of that victim’s principal investment as a result of the fraudulent investment scheme. Because this subdivision provides, in cases covered hereunder, for determination of the net loss of each victim, subdivision (D), relating generally to credits against loss, shall not apply to such cases: shall not be reduced by the value of the economic benefit transferred to any individual investor in the scheme in excess of that investor’s principal investment (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).]~~

[Option 2 - No credit for benefit transferred to victims designed to lure additional “investments” in the scheme.]

- (D)B) ~~Determination Estimation of Loss.—In order to determine the applicable offense level, the court need not determine the precise amount of the loss. Rather, it need only make a reasonable estimate of that amount, the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court’s loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).~~

~~The estimate of the loss shall be based on available information, taking into account, and using, as appropriate and practicable under the circumstances to best effectuate the general rule in subdivision (A), factors such as the following:~~

- (i) ~~The fair market value of the property, or other thing of value, taken or otherwise unlawfully acquired, misapplied, misappropriated, or destroyed; or if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property or other thing of value taken or otherwise unlawfully acquired~~

~~or destroyed.~~

- (ii) *The cost of repairs to damaged property, not to exceed the replacement cost had the property been destroyed.*
- (iii) *The approximate number of victims multiplied by the average loss to each victim.*
- (iv) *More general factors, such as the scope and duration of the offense and revenues generated by similar operations.*

**[Gain]** [Option 1 would use gain as an aide in estimating loss. Option 2 raises the issue of the possible use of gain as an alternative to loss either if gain is greater than loss (or loss is zero), or when loss cannot otherwise reasonably be determined [but is not zero], but the defendant's gain can reasonably be determined.<sup>4</sup>

(v)(c)

Option 1: *The gain from the offense.*]

[Option 2:

(E) *Pecuniary Gain. The court shall use the defendant's pecuniary gain instead of as an alternative measure of loss under subsection (b)(1) if: both (i) the loss cannot reasonably be determined but the pecuniary gain can be determined; or (ii) both (i) the pecuniary gain is greater than loss (which may be zero); and (ii) the pecuniary gain more accurately reflects the seriousness of the offense.*

*"Pecuniary gain" has the same meaning given that term in Application Note 3(h) of §8A1.2 (Application Instructions - Organizations) (i.e., the before-tax profit resulting from the relevant conduct of the offense).]*

[Option 3: use gain either: (i) when loss cannot reasonably be determined; or (ii) when gain is greater than loss.]

[Option 4: only use gain when loss cannot reasonably be determined. Define "gain" as including only illegal proceeds, not allowing reduction for costs of conducting the illegal activity (with would be allowed if "pecuniary gain" is used, which is defined as the before-tax profit.)

(E)(c) *Gain. The court shall use the defendant's gain instead of as an alternative measure of loss under subsection (b)(1) if*

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<sup>4</sup> Consider as alternative to use of gain or pecuniary gain the use of "gross receipts from the offense" as used in §2F1.1(b)(7)(B).

~~[both (i) gain is greater than loss (which may be zero); and (ii) gain more accurately reflects the seriousness of the offense or (ii)] the loss cannot reasonably be determined but the gain can be determined.~~

~~“Gain” includes the proceeds from the illegal activity.]~~

~~Option 1:~~

~~(E) — Opportunity Costs. Interest (of any kind), anticipated profits, and other opportunity costs shall not be included in determining loss. However, there may be cases in which the amount of interest, anticipated profits, and other opportunity costs is so substantial that not including that amount as part of the loss would substantially understate the seriousness of the offense or the culpability of the defendant. In such cases, an upward departure may be warranted.~~

~~Option 2:~~

~~(E) — Interest. Interest shall be included in determining loss only if it is bargained for as part of a lending transaction that is involved in the offense. The court shall include any such interest that is accrued and unpaid as of the time the defendant knew or should have known that the offense had been detected.~~

~~(F) — Special Rules. The following special rules shall be used to assist in determining actual loss in the cases indicated:~~

~~(i) Fraudulent Investment Schemes. In a case involving a fraudulent investment scheme, such as a Ponzi scheme, actual loss is the sum of the net actual losses of each victim who lost all or part of that victim’s principal investment as a result of the fraudulent investment scheme. Because this subdivision provides, in cases covered hereunder, for determination of the net loss of each victim, subdivision (D), relating generally to credits against loss, shall not apply to such cases.~~

~~(ii) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes. In a case involving stolen or counterfeit credit cards (see 15 U.S.C. § 1602(k)), stolen or counterfeit access devices (see 18 U.S.C. § 1029(e)(1)), or purloined numbers or codes, the actual loss includes any unauthorized charges made with the credit cards, access devices, or numbers or codes. The actual loss determined for each such credit card, access device, or number or code shall be not less than \$100. In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device. In any such case, loss shall be not less than \$500 per access device. However, if the unauthorized~~

access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than \$100 per unused means. For purposes of this application note, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 15.

- (ii) ~~Diversions of Government Program Benefits.~~ In a case involving ~~diversion of government program~~ benefits (e.g., grants, loans, entitlement program payments), ~~actual loss is~~ shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted ~~from intended recipients or to~~ unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of \$100 but fraudulently received food stamps having a value of \$150, the loss is \$50.

In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the value of the benefits shall be considered to be not less than the difference between the legally required and actual wages paid.

In the case of a loan (e.g. a student educational loan), the value of the benefits shall be considered to be not less than the amount of savings in interest over the life of the loan compared to alternative loan terms for which the applicant would have qualified.

- ~~(iv) Davis-Bacon Act Cases. In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the actual loss is the difference between the legally required and actual wages paid.~~

~~3. In some cases in which the amount of intended loss exceeds the actual loss, whether some of the intended loss would have occurred may be speculative. In such cases, the offense level ordinarily applicable to that amount of intended loss sometimes must be reduced, in accordance with §2X1.1. (Conspiracies, Attempts, Solicitations). Specifically, in a case involving only inchoate offense conduct (i.e., a case in which the defendant was convicted only of an attempt, conspiracy, or solicitation, and in which the offense involved only intended loss), a decrease of three levels sometimes may apply, as provided under §2X1.1.~~

~~Similarly, in the case of a partially completed offense (e.g., an offense involving a completed fraud that is part of a larger, attempted fraud in which both actual loss and additional intended loss result), the offense level is to be determined, and may be decreased in some cases, in accordance with the provisions of §2X1.1, whether the defendant is convicted of the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. As explained more~~



~~fully in Application Note 4 of the Commentary to §2X1.1, in such a case, a three-level decrease in the offense level for the intended loss sometimes may apply, except that the offense level for the intended loss, with or without a three-level decrease, shall not be used if it is less than the offense level for the actual loss.~~

In the commentary to §§2B1.1 and 2F1.1 captioned “Application Notes” insert at the end the following:

11. (G) Upward Departure Considerations.

(A) Upward Departure Considerations. There may be cases in which the ~~loss~~ offense level determined under this guideline substantially understates the seriousness of the offense ~~or the culpability of the defendant~~. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:

- (i) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.
- (ii) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest.
- (iii) The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, anticipated profits, amounts based on an agreed-upon return or rate of return, or other opportunity costs, not included in the determination of loss for purposes of subsection (b)(1). (See Application Note 2).
- (~~iii~~iv) The offense created a risk of substantial loss beyond the loss determined ~~above~~ for purposes of subsection (b)(1). (See Application Note 2).
- (iv) ~~The offense (I) endangered national security or military readiness, or (II) caused a loss of confidence in an important institution.~~
- (v) The offense (I) endangered the solvency or financial security of one or more victims[~~; or (II) impacted numerous victims and the loss determination substantially understates the aggregate harm~~].

(B) Downward Departure Considerations. There also may be cases in which the ~~loss~~ offense level determined under this guideline substantially overstates the seriousness of the offense ~~or the culpability of the defendant~~. In such cases, a downward departure may be warranted. The following is a non-exhaustive list

~~of factors that the court may consider in determining whether~~ For example, if a primary objective of the offense was a mitigating, non-monetary objective, such as to fund medical treatment for a sick parent, a downward departure ~~is~~ may be warranted.

(i) The primary objective of the offense was a mitigating, non-monetary objective, such as to fund medical treatment for a sick parent. ~~For example, the primary objective of the offense was to fund medical treatment for a sick parent. However, if, in addition to that primary objective, a substantial objective of the offense was to benefit the defendant economically, a downward departure for this reason would not ordinarily be warranted.~~

[(ii) The loss significantly exceeds the greater of the [defendant's] actual or intended [personal] gain, and therefore significantly overstates the culpability of the defendant ~~The defendant made complete, or substantially complete, restitution prior to the time the defendant knew or should have known that the offense had been detected.~~]

~~(I) — Appropriate Deference. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. Accordingly, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).~~

Background:

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The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline. Because of the structure of the Sentencing Table (Chapter 5, Part A), subsection (b)(1) results in an overlapping range of enhancements based on the loss.

[If option 1 is adopted for causation the following language would be appropriate:

~~Except as excluded above, B~~both direct and ~~consequential~~ indirect pecuniary harm that is a reasonably foreseeable result of the offense will be taken into account in determining the loss. Accordingly, in any particular case, the determination of loss may include consideration of factors not specifically set forth in this guideline. For example, in an offense involving unlawfully accessing, or exceeding authorized access to, a "protected computer," as defined in

18 U.S.C. § 1030(e)(2)(A) or (B), "loss" is the reasonably foreseeable pecuniary harm to the victim, which typically includes costs such as conducting a damage assessment and restoring the system and data to their condition prior to the offense [, and any lost revenue due to interruption of service]. ~~The Commission does not intend that the cost to the government of prosecution and criminal investigation of an offense covered by this guideline will be included in the determination of loss, even if such costs are reasonably foreseeable.~~ Likewise, in a product substitution case, the loss includes the victim's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or modifying the product so that it can be used for its intended purpose, plus the victim's reasonably foreseeable cost of correcting the actual or potential disruption to the victim's business caused by the product substitution. Similarly, in a defense contract fraud case, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable.]

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[Make all technical and conforming amendments necessary to fully execute this amendment.]